Supreme Court, U.S.
FILED
JUL 30 1997
CLERK

Nos. 96-1964 and 97-5255

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES A. MERRIAM, PETITIONER

v.

UNITED STATES OF AMERICA

HAROLD B. HAYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits petitioners' prosecution on charges of conspiracy and fraud after they were debarred from the securities industry based on the same events as those underlying the prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 108 F.3d 1162. The opinion of the district court (Pet. Supp. App. 11a-22a) is unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 96-1964. "Pet. Supp. App." refers to the supplemental appendix to the same petition.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1997. A petition for rehearing by petitioner Hayes was denied on April 29, 1997. The petition for a writ of certiorari in No. 96-1964 was filed on June 10, 1997. The petition for a writ of certiorari in No. 97-5255 was filed on July 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 26, 1995, a grand jury in the Northern District of California returned a superseding indictment charging petitioners with conspiracy, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343; and securities fraud, in violation of 15 U.S.C. 78j and 78ff. Before trial, petitioners filed a motion to dismiss the indictment on double jeopardy grounds. The district court denied the motion, Pet. Supp. App. 11a-22a, and the court of appeals affirmed, Pet. App. 1a-10a.

1. On March 7, 1994, the Securities and Exchange Commission (SEC) filed a civil action against petitioner Merriam and The Vintage Group, Inc., a venture capital company that Merriam controlled. The complaint alleged that, on two occasions, including once in mid-1990, Merriam had fraudulently inflated the price of Vintage stock, misappropriated Vintage funds, and engaged in insider trading. 96-1964 Gov't C.A. Br. 3-5. Based on those transactions, the SEC complaint alleged that Merriam committed securities fraud, in violation of 15 U.S.C. 77q(a) and 78j(b); sold unregistered securities, in violation of 15 U.S.C. 77e(a); failed to make and keep records required by the Investment Company Act, in violation of 15 U.S.C. 80a-30(a); and breached his fiduciary duty under the

Investment Company Act, in violation of 15 U.S.C. 80a-35(a). Pet. Supp. App. 12a.

On October 20, 1994, Merriam executed a consent to entry of judgment in the SEC action, and the district court subsequently entered judgment against him. In the consent to entry of judgment, Merriam admitted that he had received $1,141,030 for his illegal sales of Vintage stock. He was not required to disgorge that or any amount, however, because of his inability to pay. Pet. Supp. App. 13a; 96-1964 Gov't C.A. Br. 5 & n.2. The judgment entered against Merriam provided that he "is permanently barred from acting or serving as an officer or director of any issuer either having a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78*o*(d)]." Pet. App. 5a (brackets in original).

2. At the relevant times, petitioner Hayes was employed as a broker-dealer by Britson Investments, a brokerage firm registered with the National Association of Securities Dealers (NASD). 97-5255 Pet. 2-3. On March 6, 1992, the NASD's Market Surveillance Committee (MSC) initiated disciplinary proceedings against Hayes and others relating to the sale of Vintage stock. Pet. App. 5a. After an evidentiary hearing, the MSC concluded that Hayes had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, as well as several NASD rules and regulations. Hayes was censured, fined $300,000, and barred from association with any member of NASD in any capacity. Pet. App. 6a. Those sanctions were sustained on Hayes's appeal to the NASD National Business Conduct Committee, which found that "a bar in

all capacities is warranted in this matter due to the egregious nature of the violative activity, and to protect the investing public against this form of manipulative activity by those in the securities industry." 97-5255 Gov't C.A. Br. 7 (emphasis omitted). The SEC also upheld the sanction, stating that "there is an ample basis for us to conclude that Hayes poses a significant risk to investors and is unfit to be in the securities industry." *Ibid.* (emphasis omitted).

3. In July 1995, petitioners were indicted on conspiracy, wire fraud, and securities fraud charges. The indictment rested on petitioners' efforts to manipulate Vintage stock in mid-1990 by using false and inflated financial data. 96-1964 Gov't C.A. Br. 3-4. Petitioners moved to dismiss the indictment, alleging that they had already been punished for that conduct by their debarment sanctions. They argued that their conviction and sentencing on the criminal indictment would result in a second punishment for the same offense, in violation of the Double Jeopardy Clause's prohibition on multiple punishments.

The district court denied the motion. Pet. App. 11a-22a. The court rejected the contention that, under *United States* v. *Halper*, 490 U.S. 435 (1989), debarment from participation in commercial activity constitutes "punishment" for purposes of the Double Jeopardy Clause. The court noted that "[b]ars similar to those imposed here have repeatedly been found to serve remedial purposes." Pet. Supp. App. 16a (citing *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) and *United States* v. *Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979)). The court therefore held that the debarment orders were "remedial in nature and did not con-

stitute punishment for purposes of the Double Jeopardy Clause." *Id.* at 17a.[2]

4. The court of appeals affirmed. Pet. App. 1a-10a. Relying on its precedent in *United States* v. *Borjesson*, 92 F.3d 954 (9th Cir.), cert. denied, 117 S. Ct. 622 (1996), the court rejected petitioners' contention that their debarment sanctions precluded their criminal prosecution.[3] Pet. App. 7a. Applying *Borjesson* to this case, the court of appeals held that debarment under the securities laws is a civil, remedial sanction

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[2] The district court also rejected petitioner Hayes's argument that the imposition of a $300,000 penalty against him by the NASD and the SEC constituted punishment. The court noted that the NASD had specifically found that Hayes had reaped profits amounting to $277,000 from his illegal scheme. Pet. Supp. App. 18a. It therefore concluded that the $300,000 penalty was justified as disgorgement, which "is a remedial rather than punitive sanction." *Id.* at 17a. The court also noted that the $23,000 difference between the profits reaped and the penalty was readily attributed to the NASD's investigative costs, which the NASD was entitled to recover under *Halper*. *Id.* at 19a. Hayes did not challenge that aspect of the district court's decision in the court of appeals, and has not done so in this Court.

[3] In *Borjesson*, the court concluded that debarment from federal housing programs serves the remedial purpose of "maintaining the integrity and the appearance of integrity of government programs," 92 F.3d at 955, and thus does not constitute punishment for purposes of the Double Jeopardy Clause. In addition, the *Borjesson* court ruled that this Court's decision in *Halper*—which held that the imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" may constitute double jeopardy when imposed on one who has already been criminally convicted for the same conduct, 490 U.S. at 442—has no application to the sanction of debarment. 92 F.3d at 956.

designed to protect investors and to maintain the integrity of the securities markets. *Id.* at 8a. The court found nothing in petitioners' debarment "so punitive in form and effect so as to render [it] criminal despite Congress' intent to the contrary." *Ibid.* (quoting *United States* v. *Ursery*, 116 S. Ct. 2135, 2148 (1996)). The court also noted that "[e]very court to consider these types of [debarment] orders has concluded that they do not equate to punishment because they serve a remedial goal." *Id.* at 10a n.3.

ARGUMENT

Petitioners renew their contention that the debarment orders entered against them constitute punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. That punishment, they contend, bars their prosecution on the pending indictment. The court of appeals correctly rejected that contention, and its decision is consistent with the decisions of every other court of appeals that has considered the issue. Accordingly, further review is unwarranted.

1. The Double Jeopardy Clause prohibits both "successive punishments and * * * successive prosecutions." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993); see also *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Although Congress ordinarily "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Clause, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), in *United States* v. *Halper*, 490 U.S. 435 (1989), this Court "announce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he

has caused." *Id.* at 449. The rule in such cases is that "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.* at 449-450. If the civil penalty "does not remotely approximate the Government's damages and actual costs," *id.* at 446, then it constitutes punishment and must be reduced to a remedial level, *id.* at 452.

In *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), this Court held that the *Halper* rule is "impossible to apply outside the context of a fixed civil-penalty provision." *Id.* at 2146. The Court concluded that when a civil sanction "serve[s] a variety of purposes" beyond compensating the government for losses resulting from the defendant's conduct, "the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable." *Id.* at 2145. In such cases, a nominally civil sanction violates the Double Jeopardy Clause only if the sanction "was intended as punishment, so that the proceeding is essentially criminal in character." *Id.* at 2141-2142.

In *United States* v. *Borjesson*, 92 F.3d 954 (9th Cir.), cert. denied, 117 S. Ct. 622 (1996), the court of appeals, relying on *Ursery*, held that *Halper*'s case-by-case balancing test could not be applied to the sanction of debarment (there, debarment from federal housing programs) because debarment is not a monetary

sanction that can be compared to the government's damages and costs. Here, the court of appeals relied on *Borjesson* to reject petitioner's contention that "*Halper* controls" his case. Pet. App. 7a n.1. Instead, the court of appeals applied the test set forth in *Ursery* and prior decisions of this Court and held that SEC debarment proceedings are not "essentially criminal in character."

The court of appeals' analysis of debarment orders is correct. Whatever the limits of this Court's decision in *Halper*, it cannot apply to a nonmonetary sanction such as debarment, because it is "impossible" to "compare the harm suffered by the Government against the size of the penalty imposed." *Ursery*, 116 S. Ct. at 2145. Moreover, as this Court long ago held, a statutory scheme that provides for debarment is not "essentially criminal in character," because debarment is not a punitive sanction. See *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2. Instead, debarment from participation in a regulated industry is a remedial sanction because its purpose is "to purge sensitive industries of corruption and thereby protect the public." *United States* v. *Stoller*, 78 F.3d 710, 724 (1st Cir.), cert. dismissed, 117 S. Ct. 378 (1996); see also *United States* v. *Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) ("[r]emoval of persons whose participation in those programs is detrimental to public purposes is remedial by definition"). For these reasons, every court of appeals that has considered the issue has held that the sanction of debarment does not implicate the Double Jeopardy Clause. See *United States* v. *Glymph*, 96 F.3d 722 (4th Cir. 1996) (debarment from government contracting); *United States* v. *Stoller*, *supra* (ban from service in any federally insured bank); *DiCola* v. *FDA*, 77 F.3d 504 (D.C. Cir.

1996) (debarment from providing services to pharmaceutical companies); *Bae* v. *Shalala*, 44 F.3d 489 (7th Cir. 1995) (debarment from providing services to drug applicants); *United States* v. *Hudson*, 14 F.3d 536 (10th Cir.) (debarment from participating in affairs of any federally insured bank), on remand on other issues, 879 F. Supp. 1113 (W.D. Okla. 1994), rev'd, 92 F.3d 1026 (10th Cir. 1996), cert. granted, 117 S. Ct. 1425 (1997); *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) (securities trading ban); *Manocchio* v. *Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (debarment from Medicare programs); *Bizzell*, *supra* (debarment from HUD programs). Those decisions are consistent with earlier cases that recognized the remedial nature of license revocations. See, *e.g.*, *Hawker* v. *New York*, 170 U.S. 189, 196 (1898) (law prohibiting felons from practicing medicine is not punishment for purposes of the Ex Post Facto Clause because the "State is not seeking to further punish a criminal, but only to protect its citizens"); *Emory* v. *Texas State Board of Medical Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984) (revocation of medical license is not punishment because "revocation of privileges voluntarily granted is 'characteristically free of the punitive criminal element'") (citation omitted).

2. There is no need to hold this case pending disposition of *Hudson* v. *United States*, cert. granted, 117 S. Ct. 1425 (1997). In that case, the question presented is whether the Double Jeopardy Clause bars the prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries of defendants who previously paid $44,000 in civil money penalties imposed by the Comptroller of the Currency. A decision rejecting the double jeopardy claim in *Hudson* would lend no assistance to

petitioners in this case. But even resolution of the double jeopardy claim in *Hudson* in favor of the defendants in that case would not assist the petitioners here, for even if the Court held in *Hudson* that the civil money penalties assessed against the defendants in that case triggered the Double Jeopardy Clause's multiple punishments prong, that decision would not imply that a nonmonetary sanction such as debarment also constitutes punishment. Instead, as the courts of appeals have uniformly held, debarment is a remedial sanction that does not trigger the protection of the Double Jeopardy Clause.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997